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No. 84-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL E. NELMS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the petitioner have the right to testify in his own defense and while so testifying to invoke the Fifth Amendment as to other criminal charges for which he was under indictment and which occurred fourteen months after the alleged crime for which the petitioner was on trial?

2. Did the petitioner have the right to have the court grant immunity to the defense witness, Hal Vest, who was one of two eyewitnesses and whose testimony would have exonerated the petitioner when the State of Tennessee granted an accomplice immunity to testify against the petitioner?

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The respondent respectfully submits that the petition for a writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The unpublished opinions of the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee appear in the appendix to the petition for a writ of certiorari to this Court.

JURISDICTION

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 17, 1982, the grand jury of Henry County, Tennessee, indicted the petitioner on five (5) counts involving an assault upon Jack Weaver on January 22, 1981, to-wit:

Count I - Assault with intent to commit murder in the first degree;

Count II - Armed robbery;

Count III - Accessory before the fact of assault with intent to commit murder in the first degree;

Count IV - Making a threat for the purpose of obtaining action; and

Count V - Conspiracy.

On May 3, 1982, the grand jury of Hardeman County, Tennessee, indicted the petitioner for conspiracy and solicitation to commit the murder of Jack Weaver.

The Henry County indictment alleged the petitioner's involvement in a January 22, 1981, assault of Jack Weaver. The Hardeman County indictment alleged the petitioner's involvement in a March, 1982, crime against Jack Weaver. The January, 1981, crime and the March, 1982, alleged crime occurred approximately fourteen (14) months apart.

The petitioner was tried by a jury in Henry County on July 19-20, 1982, upon his plea of not guilty. Upon the conclusion of the presentation of evidence by the State the trial judge dismissed Counts I and II of the indictment. The petitioner was convicted of Count IV and lesser included offenses of Counts III and V as follows:

Count III - Accessory before the fact of aggravated assault and punishment fixed at not less than three (3) nor more than ten (10) years in State penitentiary;

Count IV - Making a threat for the purpose of obtaining action and punishment fixed at not less than two (2) nor more than five (5) years in State penitentiary; and

Count V - Conspiracy to commit an indictable offense and punishment fixed at eleven (11) months and twenty-nine (29) days in the Henry County jail and a fine of $1,000.00.

A summary of the evidence adduced at the petitioner's trial is contained in the opinion of the Court of Criminal Appeals, which opinion appears as Appendix A of the petition for writ of certiorari.

At trial, the State introduced as evidence two tape-recorded conversations in which the petitioner authorized the obtaining of a hit man to "eliminate" Weaver. At a jury-out hearing, the petitioner sought to prohibit any cross-examination of him about the tape-recorded conversations. The trial court responded that the tapes had been admitted and, therefore, cross-examination on those conversations would be proper. The court ruled that if the petitioner took the stand he would be required to answer all questions that would be "relevant to cross-examination, which would include questions concerning the tapes."

During the course of the trial, the petitioner's attorneys asked the court to grant immunity to Hal Vest, one of two persons present when Weaver was assaulted in January, 1981, so that Hal Vest could testify for the petitioner. The trial court denied the petitioner's motion. The State had granted Gene Faglier immunity to testify for the prosecution.

The petitioner appealed his Henry County conviction to the Court of Criminal Appeals, which affirmed the trial court's judgment on January 26, 1984. The Supreme Court of Tennessee denied the petitioner's application for permission to appeal on June 4, 1984.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the instant petition should be denied since the judgment of the Court of Criminal Appeals of Tennessee does not involve any federal question of substance not heretofore determined by this Court or not decided in accord with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

A.

In his first question presented to this Court, the petitioner contends that he had a right to invoke the Fifth Amendment as to the tapes implicating him in the March, 1982, incident for which he was under indictment in Hardeman County.

It is well-established that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. *McGautha v. California,* 402 U.S. 183, 215 (1971). The privilege against self-incrimination does not shield him from proper questioning. *United States v. Havens,* 446 U.S. 620, 626-627 (1980); *Brown v. United States,* 356 U.S. 148, 154-155 (1958). As this Court noted in *Jenkins v. Anderson,* 447 U.S. 231 (1980),

> [a] defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown v. United States,* 356 U.S. 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958).

447 U.S. at 238.

In the instant case, the petitioner never formally invoked the Fifth Amendment privilege against self-incrimination since he did not take the stand and testify in his own behalf. The privilege against self-incrimination may not be asserted in advance of questions actually propounded. *United States v. Harmon,* 339 F.2d 354, 359 (6th Cir. 1964), *cert. denied* 380 U.S. 944 (1965), *rehear. denied* 380 U.S. 989; *United States v. Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969); *United States v. Held,* 435 F.2d 1361, 1366 (6th Cir. 1970); *United States v. Bell,* 448 F.2d 40, 42 (9th Cir. 1971). The privilege is merely an option of refusal, not a prohibition of inquiry. 8 Wigmore, Evidence § 2268 (3d ed. 1961); 98 C.J.S. Witnesses § 436. Thus, the petitioner's claim of the Fifth Amendment privilege was premature and not properly invoked in this case. The advance ruling of the trial court that he would require the petitioner "to answer all questions that would be relevant to cross-examination" conveyed a correct statement of the law to the petitioner. *See McGautha v. California, supra.* The petitioner weighed the risk of cross-examination and chose not to testify, precluding any claim of the privilege. The petitioner's allegation on this issue does not merit the granting of certiorari.

B.

In the second question presented for review, the petitioner contends that he had a right to have the trial court grant immunity to the defense witness, Hal Vest.

Immunity statutes are ordinarily for the benefit of the prosecution and may not be invoked by the accused to compel the testimony of desired witnesses. *See, e.g., State v. Perry,* 246 Iowa 861, 69 N.W.2d 412, 419 (1964). There is no constitutional right to have immunity conferred on defense witnesses. *United States v. Allstate Mortgage Corp.,* 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied* 421 U.S. 999; *United States v. Trejo-Zambrano,* 582 F.2d 460, 464 (9th Cir. 1978), *cert. denied* 439 U.S. 1005; *Autry v. Estelle,* 684 F.2d 1126, 1130 (5th Cir.

1983); *United States v. Fricke,* 684 F.2d 1126, 1130 (5th Cir. 1982), *cert. denied* ____ U.S. ____, 103 S.Ct. 1250, *rehear. denied,* ____ U.S. ____, 103 S.Ct. 1805.

The petitioner asks this Court to adopt the view of the United States Court of Appeals for the Third Circuit imposed in federal prosecutions in *United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976); *Herman v. United States,* 589 F.2d 1191 (3d Cir. 1978); *Government of Virgin Islands v. Smith,* 615 F.2d 964 (3d Cir. 1980), which essentially holds that where a witness has essential exculpatory evidence, a defendant is entitled to the witness's testimony by judicially conferred immunity unless outweighed by strong government interests. However, even if this holding were made applicable here, the petitioner had no right to have immunity granted to Hal Vest. The record fails to show that the prosecution's decision (not to grant immunity to Vest) was made with "the deliberate intention of distorting the judicial fact finding process", *United States v. Herman, supra,* 589 F.2d at 1204, rather than legitimate, bona fide prosecutorial interests, or that Vest possessed essential exculpatory evidence. The petitioner's allegation on this issue does not merit the granting of certiorari.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that, in affirming the petitioner's conviction, the Court of Criminal Appeals of Tennessee did not decide a federal question of substance not heretofore determined by this Court nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause, and accordingly, the instant petition should be denied.

Respectfully submitted,

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